

### Remarks

Claims 1-4, 6, 10-21, 23-39, and 41-50 are pending. Claims 1, 21, 26, 29, and 39 have been amended while claims 5, 7-9, 22, and 40 have been cancelled. Claims 11, 23, 26 and 41 have been amended. Applicants assert that all pending claims are in a condition for allowance. Applicants request reconsideration in view of the amendments and remarks below.

### 103 Rejections

Claims 1-3, 6, 10-14, 17-20, 29-31, 33, 35-39 and 41-50 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sage (U.S. Pat. 4,630,323) in view of Hess (U.S. Pat. 4,574,976). Claims 4, 15, 24 and 34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sage in view of Hess and further in view of Spier (U.S. Pat. 3,133,292). Claims 16, 21, 23, 25-28 and 32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sage in view of Hess and further in view of Smith (U.S. Pat. 3, 563, 837). Applicants traverse each of these rejections to the extent they apply to the currently pending claims.

### Claim 1-4, 6 and 10

Claims 1-4, 6 and 10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sage and Hess. The Office Action rejects independent claim 1 by asserting that Sage describes most of the claim elements. The Office Action concedes that Sage fails to describe a flap with a first edge attached to the first material such that the flap covers the opening in the fixture guard panel and a fastener. The Office Action proceeds by asserting that Hess cures this deficiency. In addition, the Applicant notes that because the Office Action concedes that Sage does not describe the flap, the office action also necessarily concedes that Sage also fails to describe that a fastener between a second edge of the flap and the enclosure, wherein the flap comprises a flexible material and wherein the fastener comprises hook and loop fastener.

However, as described more fully below, Applicants respectfully assert that Hess is non-analogous art relative to the claim recitations. Further, for similar reasons, there is no motivation to combine Hess and Sage. Therefore, independent claim 1 is allowable

over the combination of Sage and Hess.

In order to rely on a reference as a basis for rejection, the reference must either be in the field of the applicant's endeavor or reasonably pertinent to the problem concerned. MPEP 2141.01(a). In Hess, the drain plug to hold back water is not in the field of the applicant's endeavor which is protecting a surface from damage. Holding back water in a tank has nothing to do with protecting a surface or a fixture from impact damage. Further, Hess is not reasonably pertinent to the problem of protecting a fixture because one of ordinary skill would not naturally look to a water tank drain stop for a means to cover an opening in a protective pad. See, *In re Oetiker*, 977 F.2d 1443 (Pre-assembled hose clamp hook was not with the field of endeavor of garment hook-and-eye fastener). Since Hess is non-analogous art, Hess can not be relied upon as a basis for a §103 rejection. MPEP 2141.01(a).

Further, assuming for this particular analysis that Hess is analogous art, there is no motivation to combine the bath liner of Sage and the drain stop of Hess. The liner of Sage has an opening through it to allow the surrounding water to more easily drain out of the tub although the water would inevitably drain since the water surrounds the outside liner. A functional tub is always equipped with a drain plug. Such is the case in Sage since in Sage there is no flap but the tub is still useable; therefore, there must be a drain plug for the tub. Since the addition of a Hess flap would be nothing but an extraneous complication to the Sage pad, there is no express or implied suggestion to combine the references. It then follows that there is no motivation to combine Hess and Sage and independent claim 1 is allowable for at least this reason. Claims 2-4, 6 and 10 depend from an allowable independent 1 and are allowable for at least the same reasons.

As to claim 2, neither Sage nor Hess describes each and every claim element. For example neither reference describes that the first side and the second side are "hemmed" together at one or more edges to form the enclosure. Specifically, neither reference describes hemming. Hess describes a Velcro strip being used and shows a sheet of material lashed to frame. Sage does not describe how sheets 16, 18, 24 and 36 are secured. Figures 6-8 of Sage merely show a sheet edge touching another sheet or the same sheet. Sage does not describe that the first side and the second side are "hemmed" together at one or more edges to form the enclosure. Since neither Sage nor Hess

describes that the first side and the second side are “hemmed” together, their combination also fails to describe all of the claim elements. As such, claim 2 is allowable over the combination of Sage and Hess for at least this same reason.

#### Claims 11-20

Independent claim 11 recites a fixture guard panel that comprises... an opening through the first sheet, the padding layer, and the second sheet, and a flap with a first edge attached to the first sheet such that the flap covers the opening. The Office Action relies on the combination of Sage and Hess as describing each and every claim element. However, for at least the same reasons described above in regard to independent claim 1, Hess is non-analogous art and there is also no motivation to combine Sage and Hess. Thus, claim 11 is allowable over the combination of Sage and Hess for at least these reasons.

Further, neither Sage nor Hess describe **a first sheet of a first flexible material, a second sheet of a second flexible material**; a padding layer that is disposed between the **first sheet and the second sheet**, wherein **the first sheet and the second sheet are joined** at one or more edges to contain the padding layer. Hess merely describes a fabric water stop made up of a single sheet of material. Sage describes a single layer **16, 18, 24, 36** of material enclosing a core of resilient material (Col. 1, 42 and 66-67, Col. 3, l. 1-2). Therefore, since neither Sage nor Hess describes **a first sheet of a first flexible material and a second sheet of a second flexible material**, independent claim 11 is allowable over the combination of Hess and Sage for at least this additional reason.

In the interest of an efficient prosecution, Applicants also point out universally that the other secondary references of Spier and Smith fail to cure the above deficiencies of Sage and Hess. Spier only describes a single sheet covering the pad and not a first sheet and a second sheet. Smith describes that its pad is formed from a **single** large sheet is laid open and subsequently folded over after the filling material is placed in the sheet. Smith therefore suffers from the same deficiencies as Sage. As such, each of Spier and Smith also fail to cure the deficiencies of the combination of Sage and Hess.

As to claim 13, neither Sage nor Hess describes each and every claim element. For example neither reference describes that the first side and the second side are

“hemmed” together at one or more edges to form the enclosure. Specifically, neither reference describes hemming. Hess describes a Velcro strip being used and shows a sheet of material lashed to frame. Sage does not describe how sheets 16, 18, 24 and 36 are secured. Figures 6-8 merely show the sheet edges touching another sheet or the same sheet. Sage does not describe that the first side and the second side are “hemmed” together at one or more edges to form the enclosure. Since neither Sage nor Hess describes that the first side and the second side are “hemmed” together, their combination also fails to describe all of the claim elements. As such, claim 13 is allowable over the combination of Sage and Hess for at least this same reason.

For the above reasons, dependent claims 12-20 depend from an allowable base claim 11 and are also allowable for at least the same reasons.

#### Claims 21 and 23-28

Claims 21 and 23-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Sage and Hess and further in view of Smith. The Office Action rejects independent claim 21 by asserting that Sage describes most of the claim elements. On page 2, the Office Action concedes that Sage fails to describe a flap with a first edge attached to the first material such that the flap covers the opening in the fixture guard panel and a fastener. The Office Action proceeds by asserting that Hess cures this deficiency. In addition, the Applicant notes that because the Office Action concedes that Sage does not describe the flap, the office action also necessarily concedes that Sage also fails to describe that a fastener between a second edge of the flap and the enclosure, wherein the flap comprises a flexible material and wherein the fastener comprises hook and loop fastener.

However, as described above in regards to independent claim 1, Applicants respectfully assert that Hess is non-analogous art relative to the claim recitations. Further, for similar reasons discussed above, there is no motivation to combine Hess and Sage. Therefore, it then follows that there is no motivation to combine Hess and Sage. Further, Smith describes a stuffed mat and is not concerned with flap of any type. As such, Smith fails to cure the deficiencies for Sage and Hess and Independent claim 21 is allowable for at least this reason. Claims 23-28 depend from an allowable independent

21 and are allowable for at least the same reasons.

#### Claims 29-38

Applicants respectfully assert that neither Sage nor Hess discloses flexible material of a second fixture guard panel that comprises a non-skid, non-adhesive material that is different than the flexible material of the first fixture guard panel that contacts the fixture. Sage does not describe that any layer of water resistant material covering a resilient pad comprises a non-skid, non-adhesive material that is a different material than the layer of waterproof material covering any of the other resilient pad. Sage merely describes a single sheet of a smooth material covering each entire pad. (Col. 1, l. 15-20; Col. 2, l. 40-45 and 50-55; Col. 2, l. 65-Col. 3, l. 6). Although Sage describes that each core of resilient material (i.e., a pad) is enclosed by a layer of plastic or other waterproof or water resistant material, Sage does not describe that the layer is a non-skid, non-adhesive material that is different from one core of resilient material to another. Therefore Sage does not describe the flexible material of a second fixture guard panel that comprises a non-skid, non-adhesive material that is different than the flexible material of the first fixture guard panel that contacts the fixture.

Hess concerns drain stops for portable water tanks and not fixture covering pads, therefore Hess is non-analogous art and fails to cure the deficiencies of Sage. Since none of Sage, Hess or their combination describes that the flexible material of the second fixture guard panel comprises a non-skid, non-adhesive material that is a different material than the flexible material of the first fixture guard panel, the combination of Sage and Hess fails to describe each and every claim element. As such, independent claim 29 is allowable for at least this reason.

Further, there is no motivation to combine Sage and Hess because Sage teaches away from the claim elements. Sage describes that **each core** of resilient material is encapsulated by a covering having a single smooth continuous surface (Col. 1, l. 15-20; Col.) that detachably **adheres** (Col. 2, l. 43-44, 54; Col. 3, l. 28, 33-39) to the tub surface. Because Sage teaches that **each** core of resilient material is encapsulated by a smooth covering that detachably **adheres** to the surface of the tub, Sage can not be describing

that the flexible material of the second fixture guard panel comprises a non-skid, **non-adhesive** material that is **a different material** than the flexible material of the first fixture guard panel. Either the material covering each core adheres or does not. The material can not be adhesive and non-adhesive at the same time.

Because Sages teaches away from the claim elements, independent claim 29 is allowable over the combination of Sage and Hess for at least this additional reason. As discussed above, each of Spier and Smith also fail to cure the deficiencies of the combination of Sage and Hess. Dependent claims 30-38 depend from an allowable independent claim 29 and are allowable for at least this same reason.

Claim 33 had been amended to recite a low density polyethylene coating. Support for that amendment is found on page 5, lines 15-25 of the specification. Applicants assert that none of Sage, Hess, Spier or Smith describes a high density woven polyethylene and a low density polyethylene coating. As such, claim 33 is allowable over any combination of Sage and Hess for at least this additional reason.

#### Claims 39-44

Applicants respectfully assert that neither Sage nor Hess describes that the first sheet of the first fixture guard panel is a plastic and wherein the second sheet of the first fixture guard panel is a non-skid material other than plastic. In the previous Office Action dated June 14, 2006, the Office Action conceded on page 18 that Sage fails to disclose the woven polyethylene non-skid material. Further, Sage does not describe that any flexible material on one side of a resilient pad material that is **a different material** than the flexible material on the other side of a resilient pad. Sage merely describes a single sheet of a smooth material covering each entire pad. A single sheet of material is not describing that “the first sheet of the first fixture guard panel is a plastic and wherein the second sheet of the first fixture guard panel is a non-skid material other than plastic”. As Hess concerns portable water tanks and not covering pads, Hess is non analogous art and fails to cure the deficiencies of Sage.

Further, Applicants respectfully assert that the rejection based on the combination of Sage and Hess is based on impermissible hindsight. In order to uphold a prima facie determination of obviousness, the examiner must make an evaluation at a time just before

the invention was made without employing improper hindsight. Since neither Sage or Hess describes that a first sheet is a plastic and the second sheet is a non-skid material other than plastic, Applicants respectfully assert that the Office Action is applying improper hindsight from the Applicant's specification and is not reaching a conclusion based on facts gleaned solely from the prior art. MPEP 2142.

Therefore, since neither Sage, Hess nor their combination describes that the first sheet of the first fixture guard panel is a plastic and wherein the second sheet of the first fixture guard panel is a non-skid material other than plastic, the combination of Sage and Hess fails to describe each and every claim element. Further, in light of the use of impermissible hindsight discussed above, the Office Action has failed to make a prima-facie determination of obviousness. As such, independent claim 39 is allowable for at least these reasons.

Furthermore, there is no motivation to combine Sage and Hess because Sage teaches away from the claim elements. Sage describes that each core of resilient material is encapsulated by **a covering** having a single **smooth continuous** surface (Col. 1, l. 15-20; Col.) that **detachably adheres** (Col. 2, l. 43-44, 54; Col. 3, l. 28, 33-39) to the tub surface. Because Sage teaches that each core of resilient material is encapsulated by **a smooth covering** that **detachably adheres** to the surface of the tub, Sage can not be describing that the flexible material of the second fixture guard panel comprises a **non-skid, non-adhesive** material that is **a different material** than the flexible material of the first fixture guard panel. Each of Spier and Smith also fail to cure the deficiencies of Sage and Hess. Because Sages teaches away from the claim elements, independent claim 39 is allowable over the combination of Sage and Hess for at least this additional reason. As discussed above, each of Spier and Smith also fail to cure the deficiencies of Sage and Hess. Dependent claims 40-44 depend from an allowable independent claim 39 and are allowable for at least this same reason.

Claim 41 has been amended to recite that the hem is formed by one of a heat weld or an ultrasonic weld. As none of Sage, Hess, Smith or Spier describe either a heat weld or an ultrasonic weld, claim 41 is allowable over the combination of Hess and Spier for at least this additional reason. Support for the amendment is found on page 7 lines 25-32 of the specification.

#### Claims 45-50

In relation to claim 45, it is recited that a first fixture guard panel consists of a padding layer that is adjacent a first surface of the fixture. In their response dated September 14, 2006, Applicants previously explained that due to the use of “consisting” in this element, the panel is entirely the pad. This language is supported in the specification such as at page 24, lines 1-5 referring to pads 702 and 708 of FIG. 7 which are examples of non-enclosed padding.

The Examiner has failed to apply the proper interpretation to claim 45 and the use of “consists of” language. As clearly stated in MPEP 2111.03, “The transitional phrase “consisting of” excludes any element, step, or ingredient not specified in the claim. *In re Gray*, 53 F.2d 520, 11 USPQ 255 (CCPA 1931).”

Thus, in order to reject this claim, the Examiner must set forth a reference where the panel is nothing more than the padding layer, as the “consists of” language, by definition, excludes any other element, step, or ingredient as stated in *In re Gray*.

As argued in the previous response, Sage fails to disclose that any panel is just the pad, as the panels of Sage include outer layers 16 to enclose any padding 15. Furthermore, because Sage is intended to be used with water in the tub, there can be no modification to modify Sage to remove the outer layers 16 because to do so would render Sage unfit for its intended purpose. Hess is not concerned with a pad of any type and therefore fails to cure these deficiencies of Sage. Thus Sage fails to disclose all of the elements as recited in claim 45 and independent claim 45 is allowable over the combination of Sage and Hess for at least this reason.

Further for the reasons discussed above in regards to independent claims 29 and 39, there is no motivation to combine Sage and Hess. Therefore independent claim 45 is allowable over Sage and Hess for at least these additional reasons. As discussed above, each of Spier and Smith also fail to cure the deficiencies of Sage and Hess. Dependent claims 46-50 depend from an allowable independent claim 45 and are allowable over the combination of Sage and Hess for at least these same reasons.

#### Conclusion



Applicants assert that the application including claims 1-4, 6, 10-21, 23-39, and 41-50 is in condition for allowance. Applicants respectfully request reconsideration and further examination in view of the amendment and remarks above and further request that a Notice of Allowability be provided. Should the Examiner have any questions, please contact the undersigned.

No fees are believed due. However, please charge any additional fees or credit any overpayment to Deposit Account No. 50-3025.

Respectfully submitted,

Date: February 20, 2007

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